85 834

NO.

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

H. G. NIXON, as Administrator of the Estate of Lillian T. Nixon, deceased,

Petitioner,

vs.

MARGARET HECKLER, Secretary, Department of Health and Human Services,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

L. VASTINE STABLER, JR.
SANDRA VINIK
CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
1900 First National-Southern Natural Building
Birmingham, Alabama 35203
(205) 252-8800

W. W. DINNING
LLOYD, DINNING, BOGGS & DINNING
P. O. Drawer Z
Demopolis, Alabama 36732
(205) 289-0556

Attorneys for Petitioner, H. G. Nixon as Administrator of the Estate of Lillian T. Nixon, deceased

QUESTION PRESENTED FOR REVIEW

DOES THE DISTRICT COURT HAVE JURISDICTION IN A SUIT AGAINST THE SECRETARY OF HEALTH AND HUMAN SERVICES FOR DAMAGES ARISING OUT OF THE VIOLATION OF PROCEDURAL DUE PROCESS WHEN THE PLAINTIFF'S DECEDENT WAS GIVEN FALSE REASONS FOR A DENIAL OF BENEFITS?

PARTIES BELOW

Parties in the Court of Appeals were Appellant H. G. Nixon as Administrator of the Estate of Lillian T. Nixon, Deceased, and Appellee Margaret M. Heckler, Secretary of United States Department of Health and Human Services.

TABLE OF CONTENTS

	Page
Question Presented For Review	i
Parties Below	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions	3
Statement of the Case	12
Reasons for Granting the Writ	20
1. The Actions by Social Security Violate Due Process	21
2. There is a Substantive Cause of Action for Violation of Due Process	24
3. The Social Security Act Does Not Preclude this Action	28
4. There is a Conflict of the Circuits	34
Conclusion	35

Appendix:

A - Order by the Court of Appeals for the Eleventh Circuit A-1

B - Recommendation of the Magistrate A-2

C - Order of the U.S. District Court, Hon. W. B. Hand A-4

D - Objection to Magistrate's Recommendation A-5

E - Social Security Termination Notice A-13

F - Notice of Reconsideration . A-19

TABLE OF AUTHORITIES

Cases:

Armstrong v. Manzo, 380 U.S. 545 (1965) 24

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 25-27 33

Califano v. Sanders, 430 U.S. 99 (1977) 33

Carey v. Piphus, 435 U.S. 247 (1978) 25, 33

Carlson v. Green, 446 U.S. 14 (1980) 26-27

Davis v. Passman, 442 U.S. 228 (1979) 25, 27 33

Ellis v. Blum, 643 F.2d 68 (2nd Cir. 1981) 17, 34

Goldberg v. Kelly, 397 U.S. 254 (1970) 23-24

Greene v. McElroy, 360 U.S. 474 (1959) 23

Heckler v. Ringer, 52 U.S.L.W. 4547 (1984) 30

Marbury v. Madison, 1 Cranch 137, (1803) 25

Mathews v. Eldridge, 424 U.S. 319 (1976) 24

Ostroff v. State of Florida, 554 F. Supp. 347 (M.D. Fla. 1983) 18

Weinberger v. Salfi, 422 U.S. 749 (1975) 29

Constitutional Provisions and Statutes:

U.S. Const. amend. V 3

45 U.S.C. § 405(g) 32

42 U.S.C. § 405(h) 18, 20, 31

28 U.S.C. § 1331 ..... 3, 35

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

20 C.F.R. § 404.904 21

20 C.F.R. § 404.907 21

20 C.F.R. § 404.1518 22

OTHER AUTHORITIES:

Fed.R.Civ.P. Rule 15(c) 18

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

H. G. NIXON, as Administrator of the Estate of Lillian T. Nixon, deceased,

Petitioner,

vs.

MARGARET HECKLER, Secretary, Department of Health and Human Services,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The recommendation of the Magistrate in the District Court is printed as Appendix B. It was adopted by order of the District Court dismissing the cause which is printed as Appendix C. The

Order of the United States Court of Appeals for the Eleventh Circuit affirming the District Court is attached hereto as Appendix A. Thus the recommendation of the Magistrate essentially constitutes the opinion below.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The order by the Court of Appeals for the Eleventh Circuit was entered on August 14, 1985. Petitioner has 90 days to file its Petition for Writ of Certiorari with this Court. 28 U.S.C. § 2101(c). Therefore, this petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

****

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

United States Constitution, Amendment V

******

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331

******

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of

such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary

as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there

is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other

civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

42 U.S.C. § 405(g)

******

The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 1331 or 1346 of Title 28 to recover on any claim arising under this

subchapter.

42 U.S.C. § 405(h)

******

We shall mail a written notice of the initial determination to you at your last known address. The reasons for the initial determination and the effect of the initial determination will be stated in the notice. The notice also informs you of the right to a reconsideration or to a hearing. We will not mail a notice if the beneficiary's entitlement to benefits has ended because of his or her death.

20 C.F.R. § 404.904

******

Reconsideration is the first step in the administrative review process that we provide if you are dissatisfied with the initial determination. However, if the

initial determination is that your blindness or disability has ceased due to medical reasons, and you have a right to a hearing on the same issue in connection with a claim for supplemental security income benefits, your first step is to request a hearing right after the initial determination. If you are dissatisfied with our reconsidered determination, you may request a hearing.

20 C.F.R. § 404.907

******

(a) General. If you are applying for benefits and do not have a good reason for failing or refusing to take part in a consultative examination or test which we arrange for you to get information we need to determine your disability or blindness, we may find that you are not disabled or blind. If you are already receiving benefits and do not have a good

reason for failing or refusing to take part in a consultative examination or test which we arranged for you, we may determine that your disability or blindness has stopped because of your failure or refusal. Therefore, if you have any reason why you cannot go for the scheduled appointment, you should tell us about this as soon as possible before the examination date. If you have a good reason, we will schedule another examination.

(b) Examples of good reasons for failure to appear. Some examples of what we consider good reasons for not going to a scheduled examination include --

(1) Illness on the date of the scheduled examination or test;

(2) Not receiving timely notice of the scheduled examination or test, or receiving no notice at all;

(3) Being furnished incorrect or incomplete information, or being given incorrect information about the physician involved or the time or place of the examination or test, or;

(4) Having had death or serious illness occur in your immediate family.

(c) Objections by your physician. If any of your treating physicians tell you that you should not take the examination or test, you should tell us at once. In many cases, we may be able to get the information we need in another way. Your physician may agree to another type of examination for the same purpose.

20 C.F.R. § 404.1518

STATEMENT OF THE CASE

This suit arises out of a denial of procedural due process by the Social Security Administration ("Social Security") by giving Mrs. Lillian T. Nixon ("Mrs. Nixon") a false reason for terminating her disability benefits and denying her an effective opportunity to be heard.

The facts relevant to this case are evidenced by documents from Social Security files which were filed in the District Court in support of the respondent's motion for summary judgment.

In early August 1981, Mrs. Lillian T. Nixon received a notice from the Social Security that the disability payments which she had been receiving for over ten years were being re-evaluated. She was invited to provide medical evidence of

her continuing disability.

Under the applicable procedure the medical evaluations are turned over to the Disability Determination Division of the State of Alabama ("DDD") which recommends actions to be taken by Social Security. The formal action of denial and the notice which provides the gravamen of this action was thus taken by Social Security and not by the DDD.

Mrs. Nixon submitted evidence of her continuing disability to the DDD and a consultant, a doctor hired by the DDD, concluded that she was disabled. The DDD contended that it asked Mrs. Nixon to visit another doctor and another hospital for second opinions, but she missed the appointments.[1/]

[1/] There is no evidence in the record that Mrs. Nixon was ever notified of the appointments. The DDD's consulting physician said that she was too sick to attend anyway. (Appendix F)

On December 7, 1981, the DDD wrote Social Security recommending that the benefits be terminated and stated the true reason for the termination of benefits:

> Considering all evidence of record, medical documentation is not sufficient to determine the current severity of the claimant's impairments. Therefore it is recommended that disability benefits be ceased since the claimant failed to report to consultative examinations. (emphasis added)

Acting on the basis of the DDD recommendation, Social Security notified Mrs. Nixon that her benefits had been denied but gave a false reason for denial. Social Security's termination letter to her stated the following reason for termination:

> The medical evidence in your case shows that you became able to do substantial gainful work in October 1981. (Appendix E)

Mrs. Nixon appealed for reconsideration, but her approach was limited to insisting that she was disabled. Neither DDD nor Social Security ever indicated to Mrs. Nixon that her benefits were being terminated solely because she failed to show up for doctor and hospital appointments or that she could show "good reasons" for her not seeing the doctor and her benefits would be restored.

On February 19, 1982, Mrs. Nixon died. Upon learning that Mrs. Nixon died, the Social Security re-opened the case and changed its position. A notice was prepared affirming that she was no longer disabled, but, apparently upon learning of her death, Social Security amended the final notice by allowing her benefits to continue up to her death and disclosed for the first time the true reason for the previous denial of benefits:

> This decision reopens, revises and reverses the decision of December 2, 1981. The termination of benefits was based on insufficient evidence based on failure to appear for a consultative examination. Her physician stated that she was unable to go to an examination due to weakness. (emphasis added) (Appendix F)

Subsequently, on February 21, 1984, Mrs. Nixon's widower, H. G. Nixon ("Petitioner") filed suit in the United States District Court for the Southern District of Alabama, Northern Division, as Administrator of the Estate of Lillian T. Nixon against the Secretary of Health and Human Services, Margaret M. Heckler, claiming that the death of Mrs. Nixon was the result of the willful, wanton, malicious, incorrect and unlawful act of the Secretary who issued from her office the Termination Notice which caused the physical seizure from which Mrs. Nixon

died.[2/] No claim was made in the lawsuit for benefits. Indeed, her benefits have been paid. The complaint rested its jurisdictional allegation on 28 U.S.C. § 1331 and under the Federal Tort Claims Act.[3/]

[2/] There is no complaint in this case that the DDD acted outside its authority in recommending termination. The thrust of this case involves the false and deceptive notice which is the responsibility of Social Security.

[3/] Petitioner recognizes that Mrs. Heckler might in fact not be the proper defendant in this case and that some other official lower in the chain of command should be substituted. If this notice was issued pursuant to standard instructions or course of practice, then Mrs. Heckler is the appropriate party. Ellis v. Blum, 643 F.2d 68 (2nd Cir. 1981). Otherwise, some other individual might be required to be the responsible party. The government's motion for summary judgment did not raise that issue, factually or legally, either in the motion or on appeal. Because the motion was filed very soon after the litigation was commenced, plaintiff has not had the benefit of discovery which would permit identifying with specificity
(continued on page 18)

The defendant filed a motion to dismiss, or, in the alternative, motion for summary judgment, in the trial court and submitted various records and affidavits in support of the motion. The matter was referred to a magistrate who recommended on December 6, 1984, that the cause be dismissed on the ground that the district court had no jurisdiction to entertain the claim. He relied solely on the provisions of 42 U.S.C. § 405(h).[4]

---

[3] (continued from page 17) the Secretary's responsibility. If the Secretary is not the proper party, the defect is not fatal because the rules of civil procedure permit a substitution of defendants when the United States Attorney has been served. Fed.R.Civ.P. Rule 15(c).

Petitioner is not here insisting on its Federal Torts Claim Act claim.

[4] Ironically, the Magistrate cited as sole authority for his decision the case of Ostroff v. State of Florida, 554 F. Supp. 347 (M.D. Fla. 1983), which recognized the jurisdiction of Federal courts to bring damage suits for violation of procedural due process by the Social Security. See Appendix D.

Petitioner's counsel filed timely objection to the recommendation by means of a letter to the Honorable William Brevard Hand, Chief Judge of the U. S. District Court for the Southern District of Alabama. (Appendix D). On January 10, 1985, the District Court adopted the recommendation of the Magistrate and dismissed the cause for want of subject matter jurisdiction. (Appendix C)

On February 1, 1985, Petitioner filed timely appeal to the United States Court of Appeals for the Eleventh Circuit, and on August 14, 1985, the Eleventh Circuit affirmed the decision of the U. S. District Court for the Southern District of Alabama without a written opinion. (Appendix A) The issue of jurisdiction of the United States District Court was raised at every stage of the proceedings.

Petitioner now prays that a writ of

certiorari issue to review the judgment of the Eleventh Circuit affirming the dismissal by the District Court.

REASONS FOR GRANTING THE WRIT

The essence of this case involves the jurisdiction of the federal courts for a claim for consequential damages growing out of the denial of due process by Social Security. By extending the umbrella of § 405(h) of the Social Security Act, the Eleventh Circuit has failed to recognize the constitutional tort arising out of a denial of procedural process and the jurisdiction of the federal courts to try a claim for such a tort.

The Petitioner submits that (1) the actions of Social Security constitute a violation of procedural due process; (2) there is a substantive cause of

action for damages growing out of a violation of procedural due process; (3) the Social Security Act does not preclude a claim for consequential damages growing out of a violation of procedural due process; (4) the decision of the court below conflicts with the decision of the Second Circuit Court of Appeals.

1. The Actions by Social Security Violate Due Process

The Secretary's own regulations require that notice be given to the disability beneficiary of the reasons for the initial determination that the benefits will be terminated. 20 C.F.R. § 404.904. The beneficiary is then afforded an opportunity to seek reconsideration of the denial. 20 C.F.R. § 404.907. The regulations also make clear that when a beneficiary fails to show up

for a medical evaluation, Social Security is authorized to terminate benefits. 20 C.F.R. § 404.1518. However, the beneficiary is also afforded an opportunity under the regulations to present to Social Security "good reasons" for failing to appear; in which case the beneficiary may either reschedule an appointment or be excused totally from the appointment based on the circumstances. 20 C.F.R. § 404.1518.

The true reason for denial of Mrs. Nixon's benefits was the missed medical appointments. Had she been notified of the true reason, she would have been allowed the opportunity to explain her absence. Having been given a false notice, Mrs. Nixon was denied a meaningful opportunity to be heard. Appealing for reconsideration on the false premise that an actual determination had been

made that she was medically able to return to work, she submitted additional evidence of disability.

The Supreme Court has unequivocally stated that due process is not served unless an individual is given the reason for government action. In Goldberg v. Kelly, 397 U.S. 254 (1970) this Court stated as follows:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. (emphasis added)

394 U.S. at 270, quoting Greene v. McElroy, 360 U.S. 474, 496-497 (1959).

An individual's interest in continued receipt of Social Security benefits is a statutorily created property interest which is protected by the due process

clause of the Fifth Amendment, and is "entirely collateral to his substantive claim of entitlement." Mathews v. Eldridge, 424 U.S. 319, 329 (1976).

The Supreme Court described due process as "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'". Mathews v. Eldridge, supra; Goldberg v. Kelly, supra, quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). If due process was afforded Mrs. Nixon after her death, it was hardly a meaningful time. Her appeal for reconsideration was not afforded in a "meaningful manner" because an appeal based on incorrect grounds is a meaningless appeal.

2. There is a Substantive Cause of Action for Violation of Due Process.

Petitioner's cause of action is a constitutional claim derived from the

authority of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the landmark case recognizing an action for damages because of violation of the Fourth Amendment by a federal agent acting under color of his authority. This court recognized that the right to money damages is derived from Marbury v. Madison, 1 Cranch 137 (1803) which established judicial supremacy in interpretation of the United States Constitution.

The Bivens rationale has been extended to due process actions. In Carey v. Piphus, 435 U.S. 247 (1978) this Court upheld awarding damages for emotional distress which result from a denial of due process, whether or not the adverse action (the suspension of public students from school), turned out to be justified. In Davis v. Passman, 442 U.S. 229

(1979), a cause of action for damages was permitted against a congressman who allegedly dismissed his female deputy administrative assistant because of sex discrimination. Moreover, this Court has approved damage actions for death caused by violation of constitutional rights. Carlson v. Green, 446 U.S. 14 (1980) (alleged failure to provide proper medical attention to prison inmates).

The Bivens opinion discusses two possible instances where jurisdiction over the tort claim might be defeated. First, there might be "special factors counselling hesitation in the absence of affirmative action by Congress". Bivens, supra at 396. In Carlson v. Green, 446 U.S. 14, 19 (1980), this Court elucidated on that exception by indicating that the defendants must enjoy "such independent status in our constitutional scheme as to

suggest that judicially created remedies against them might be inappropriate." Carlson, supra at 19, citing Davis v. Passman. Petitioner is hard pressed to envision the type entity which would have such independence as to be exempted from responsibility for unconstitutional action. Suffice it to say, however, that no special factor appears to rescue the defendant in this case on such a basis.

Second, defendants might show "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." Bivens, supra at 397.

The absence of a remedy for violation of due process is underscored by the

facts of this case. Mrs. Nixon's benefits have been restored for the brief time up to her death. She is deceased nonetheless and no remedy is proffered by Social Security to compensate for the loss occasioned by the role played by them in her demise.

3. The Social Security Act Does Not Preclude this Action.

Mr. Nixon is not seeking benefits. He is not challenging any substantive regulatory construction which provides a basis for the allowance of benefits. Mrs. Nixon pursued the administrative process as long as she lived. The claim in this case seeks the compensatory damages which flow from what the magistrate characterized as "bureaucratic bull-headedness" of Social Security. (Appendix B) A less colorful but more apt description of the conduct of the

facts of this case. Mrs. Nixon's benefits have been restored for the brief time up to her death. She is deceased nonetheless and no remedy is proffered by Social Security to compensate for the loss occasioned by the role played by them in her demise.

3. The Social Security Act Does Not Preclude this Action.

Mr. Nixon is not seeking benefits. He is not challenging any substantive regulatory construction which provides a basis for the allowance of benefits. Mrs. Nixon pursued the administrative process as long as she lived. The claim in this case seeks the compensatory damages which flow from what the magistrate characterized as "bureaucratic bull-headedness" of Social Security. (Appendix B) A less colorful but more apt description of the conduct of the

defendant in this case would be "denial of procedural due process."

The decision below apparently equates a damage action relating to violation of due process with a specific procedure for handling of claims for benefits and appeals to the Federal District Court after a final decision by the Secretary on denial of benefits. 42 U.S.C. § 405(g). The petitioner maintains this action is not a "claim arising under" the Act. 42 U.S.C. § 405(h). Thus, the Social Security Act does not prevent the filing of this action.

The decisions of this Court have laid out the criteria for preclusion of actions under §405(h), and this case falls squarely outside of them.

In Weinberger v. Salfi, 422 U.S. 749 (1975), the Court denied a class action challenging the constitutionality of a

Social Security ruling denying a widow and child benefits, when the widow had been married to her deceased husband for less than six months. The Court ruled that this was a claim arising under the Act, noting that the remedy sought was the award of benefits and that the Social Security Act provides "both the standing and the substantive basis for the presentation of their Constitutional contentions." The fact that the claim also involved a constitutional question did not permit the plaintiff an avenue of escape from the exhaustion of remedies requirements of the Act, because the constitutional claims would be raised in the statutorily provided administrative procedures of the Act.

Heckler v. Ringer, 52 U.S.L.W. 4547 (1984) established that the Salfi ruling was not limited to actions where the

specific remedy was a recovery of benefits but also injunctive and declaratory relief wherein the object was to obtain a substantive ruling with respect to benefits. In that case, the plaintiffs were attempting to review the directive that Medicare benefits for the bilateral carotid body resection surgery were not payable because the surgery was not reasonable and necessary.[5/] The plaintiffs had failed to exhaust their administrative remedies. With respect to one of the plaintiffs, Ringer, the Court stated, "Although it is true that Ringer is not seeking the immediate payment of benefits, he is clearly seeking to establish a right to future payments should he

---

[5/] 42 U.S.C. 405(h) is made applicable to the Medicare Act by 42 U.S.C. § 1395(ii)

ultimately decide to proceed with BCBR surgery."

From these two decisions can be deduced a standard that when it is the purpose of an action to obtain benefits, then the administrative procedures must be employed. The Secretary must have an opportunity to utilize her own processes to deal with the substantive questions of entitlement raised by a particular claimant. In this case there has been a final determination on benefits which completed the decision-making process on the substantive issue of entitlement.

Exhaustion of remedies is not involved either, because the Petitioner has no administrative remedy. Jurisdiction for a claim for emotional distress resulting from a denial of due process cannot be grounded on § 405(g). "Constitutional questions obviously are unsuited to

resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. . ." Califano v. Sanders, 430 U.S. 99, 109 (1977).

This court has explicitly recognized that government officers are to be accountable for their constitutional torts, when the defendant is a Congressman, Davis v. Passman, 442 U.S. 228 (1979), a prison official, Carlson v. Green, 446 U.S. 14 (1980), a school official, Carey v. Piphus, 435 U.S. 247 (1978) and a narcotic agent Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). We are unaware of any constitutional or statutory principle which suggest that that Social Security officials enjoy an immunity from the consequences of their unconstitutional action which is not

otherwise extended to other government officials.

4. There is a Conflict of the Circuits.

The Eleventh Circuit's denial of federal question jurisdiction conflicts directly with Judge Friendly's analysis of similar facts in Ellis v. Blum, 643 F. 2d 68,76 (2d Cir. 1981). In that case the recipient claimed, among other things, damages for anxiety and physical harm caused by the Social Security's telephonic termination procedures. The recipient did not submit any evidence to contest the proposed termination because she was unable to remember the evidence which the Social Security had told her that they relied upon.

In analyzing the jurisdictional issue, the Second Circuit concluded, inter alia, that § 405(h) did not bar the recipient's

cause of action for damages against the Secretary of Health and Human Services grounded on 28 U.S.C. § 1331, since it would not be a claim "arising under" the Social Security Act, and there was no reason to preclude federal question jurisdiction. The court ruled that if the recipient would amend her complaint to state a claim for emotional distress and physical harm against the Secretary of Health and Human Services, there would be a cause of action for damages based on federal question jurisdiction under the authority of Bivens.

CONCLUSION

The Court below has permitted an over-extension of the requirement of exhaustion of remedies so that protection against unconstitutional conduct has been obliterated. We respectfully request

that this misapplication of law be reversed and petition of certiorari be granted.

Respectfully submitted,

L. Vastine Stabler

L. Vastine Stabler, Jr.

Sandra Vinik

Sandra Vinik

CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
1900 First National-Southern Natural Building
Birmingham, Alabama 35203
(205) 252-8800

W. W. Dinning

W. W. Dinning

LLOYD, DINNING, BOGGS & DINNING
P. O. Drawer Z
Demopolis, Alabama 36732

Attorneys for Petitioner, H. G. Nixon as Administrator of the Estate of Lillian T. Nixon, deceased

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-7115
Non-Argument Calendar*

H.G. NIXON, as Administrator of the Estate of LILLIAN T. NIXON, Deceased,

Plaintiff-Appellant,

versus

MARGARET HECKLER, Secretary, Dept. of Health & Human Services

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

---

(August 14, 1985)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

---

*Fed. R. App. P. 34(a); 11th Cir. R. 23

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

H. G. NIXON, :

Plaintiff :

vs. : CA 84-0186-H-B

MARGARET M. HECKLER, :
Secretary of Health
and Human Services, :

Defendant. :

RECOMMENDATION OF MAGISTRATE

Plaintiff filed suit in this Court against the Secretary of Health and Human Services, claiming that his wife was killed by the Government's alleged ham-handedness in cutting her from the disability rolls. If the claims alleged are true, the case would be an unusually stark example of Federal Government bureaucratic bull-headedness.

The problem with the case, though, is jurisdictional. A federal court is

supposed to allow suit against the Federal Government only where Congress tells us to do so, and in this case Congress told us in 42 U.S.C. § 405(h) that a suit of this kind cannot be maintained, Ostroff v. State of Florida, 554 F. Supp. 347 (M.D. Fla. 1983).

Accordingly, the Magistrate recommends that this case be dismissed for want of jurisdiction.

For a full explanation of procedural rights, see the attached sheet.

DONE this 6th day of December, 1984.

DAVID A. BAGWELL
United States Magistrate

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

H. G. NIXON,)

Plaintiff)

vs.) CA 84-0186-H-B

MARGARET M. HECKLER,)

Defendant.)

O R D E R

Upon the recommendation of the Magistrate, which is hereby adopted as the opinion of the Court, this cause is DISMISSED for want of subject matter jurisdiction. This dismissal is with prejudice, each party to bear its own costs.

IT IS SO ORDERED.

DONE this 10th day of January, 1985.

W. B. HAND
Chief Judge

APPENDIX D

CABANISS, JOHNSTON, GARDNER DUMAS & O'NEAL
1900 FIRST NATIONAL-SOUTHERN NATURAL
BUILDING
BIRMINGHAM, ALABAMA 35203

December 21, 1984

Honorable William Brevard Hand
Chief Judge
United States District Court
Southern District of Alabama
P. O. Box 1964
Mobile, Alabama 36633

RE: H. G. Nixon v. Margaret M. Heckler, Secretary of Health and Human Services; Civil Action No. 84-0186-H-B

Dear Judge Hand:

I write you to address the jurisdictional question raised by United States Magistrate David A. Bagwell in his recommendation of December 6, 1984.

Our principal difficulty with the recommendation is that the magistrate assumes that the elements of our action include a claim arising under the Social

Security Act. Plaintiff, is not claiming benefits under the Act. Plaintiff is not claiming liability simply because of a denial of benefits. The essence of the claim is that Mrs. Nixon was entitled to certain constitutional rights in her dealings with the Social Security Administration. Due process required that she be afforded notice of the basis of denial of her claim and that she be given an opportunity to be heard on reconsideration of her claim. The government's own documents show that she was not given her constitutional rights. The state disability determination unit turned Mrs. Nixon down because she failed to meet an appointment with a doctor. She was not found to be disabled. The defendant's agents, however, falsely told her that she was rejected because of a finding that she was no longer disabled.

Because she was not told the truth as to why she was turned down, she did not have an opportunity to be heard on the reason for her rejection. Had she been told the truth, she would have been permitted to demonstrate that she was physically unable to come to Montgomery for a doctor's appointment or she might have seen the doctor and preserved her pension, but she was never informed of what was necessary to protect her pension.

The United States Supreme Court has recognized that the Federal Courts have jurisdiction to hear damage claims of individuals who have been injured as a result of conduct by Federal agents who have denied the plaintiffs their constitutional rights. The leading case is Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) and the provision of

the Social Security Act are irrelevant to jurisdiction in that type of case.

The case upon which the magistrate relies, Ostroff v. State of Florida, 554 F. Supp. 347 (M.D. Fla. 1983) is in fact authority that the jurisdiction of the Federal Court in a suit against defendants acting under color of federal authority is derived directly from the United States Constitution when the cause of action is based on a violation of procedural due process. Thus, the court's jurisdiction is entirely independent of the provisions of the Social Security Act, which, in § 405(g) and (h) lays down exclusive procedures to be followed in the event of a violation of the substantive provisions of that Act, as opposed to the Nixon claim of a violation of procedural due process pursuant to the Fifth Amendment to the Constitution.

In Ostroff, the claim for damages was predicated upon the allegedly wrongful termination of Social Security benefits. Since the Social Security Act neither secures "equal rights" nor "civil rights", but merely entitlements, the denial of benefits could not give rise to a constitutional claim. Furthermore, since by its very terms, § 405(h) of the Social Security Act prohibits actions under 29 U.S.C. § 1331 or § 1346 to recover on any claim arising out of Title II of the Act, the plaintiff in Ostroff had no cause of action for consequential or punitive damages arising from the termination of benefits.

The court however found that a Bivens-type action would lie if Ostroff had alleged or suffered a denial of procedural due process:

> . . . the only possible con-

> stitutional claim that the plaintiff might have is that the defendants denied him procedural due process.

Thus the Ostroff court endorsed the viability of an action arising independently of the Social Security Act, and derived directly from the Constitution based on a violation of the 5th Amendment.

On the facts of Ostroff, the court found that there was no cause of action pursuant to Bivens because Ostroff did not allege a constitutional violation, and had in fact been afforded due process. In contradistinction to Ostroff, however, in Mrs. Nixon's case, a violation of due process has been alleged in the complaint and, the facts illustrate a most grotesque contortion of Mrs. Nixon's constitutional rights to notice and an opportunity to be heard. In fact, Magistrate Bagwell stated in his

letter that "[i]f the claims are true, the case would be an unusually stark example of Federal Government Bureaucratic bullheadedness."

Thus, this case falls within the ambit of Ellis v. Blum, 643 F.2d 68 (2d Cir. 1981), which is endorsed both in Ostroff (see footnote 9 at 353) and in plaintiff's brief. Ellis v. Blum, like Ostroff, mandates that if claim does not relate to the substantive disability determination (which is barred by § 405(b)), but to the termination notice procedures then the plaintiff has a valid constitutional claim arising directly from the Fifth Amendment to the Constitution pursuant to the doctrine of Bivens. Thus, it is irrelevant and outside of the scope of this inquiry whether Congress has authorized the above

suit either pursuant to the Social Security Act or any other statute, since jurisdiction is derived from the Constitution.

Enclosed is a copy of the brief which we submitted to Magistrate Bagwell which more fully sets forth our position.

Very truly yours,

L. Vastine Stabler, Jr.

/msw
Encl.
cc: Hon. David A. Bagwell
Mr. J. B. Sessions, III
Mr. Thomas H. Figures
Mr. W. W. Dinning

APPENDIX E

SOCIAL SECURITY
TERMINATION NOTICE

From: Office of Disability Operations
Baltimore, Maryland 21241 04 C2

Date: 08 JAN 1982

LILLIAN T. NIXON
905 S MAIN AV
DEMOPOLIS AL 36732

Claim Number:
419-22-8055 HA

THE LAW PROVIDES THAT AN INDIVIDUAL'S DISABILITY PERIOD SHALL END IF THE PERSON IS ABLE TO DO SUBSTANTIAL GAINFUL WORK. THE LAW ALSO PROVIDES THAT AN INDIVIDUAL WILL RECEIVE BENEFIT PAYMENTS FOR THE MONTH DISABILITY ENDS AND THE FOLLOWING TWO MONTHS. THE MEDICAL EVIDENCE IN YOUR CASE SHOWS THAT YOU BECAME ABLE TO DO SUBSTANTIAL GAINFUL WORK IN OCT 1981. ACCORDINGLY, THE LAST DISABILITY BENEFIT PAYMENT TO WHICH YOU ARE ENTITLED IS FOR THE MONTH OF DEC 1981. THIS DETERMINATION IS BASED ON ALL THE EVIDENCE IN YOUR FILE, INCLUDING ANY ADDITIONAL EVIDENCE

YOU MAY HAVE SUBMITTED. THE DECISION ON YOUR CLAIM WAS MADE BY THE SOCIAL SECURITY ADMINISTRATION ON THE BASIS OF A DISABILITY DETERMINATION BY AN AGENCY OF THE STATE IN WHICH YOU LIVE. PHYSICIANS AND OTHER TRAINED DISABILITY EVALUATION PERSONNEL IN THE STATE AGENCY PARTICIPATED IN MAKING THIS DETERMINATION.

SINCE YOU ARE NO LONGER ENTITLED TO BENEFITS, YOUR HOSPITAL AND MEDICAL INSURANCE COVERAGE UNDER MEDICARE ENDS THE LAST DAY OF FEB 1982. PLEASE DESTROY YOUR HEALTH INSURANCE CARD AFTER THE LAST DAY OF COVERAGE INDICATED ABOVE.

YOU WILL BE NOTIFIED AT A LATER DATE IF AN UNDERPAYMENT OR OVERPAYMENT OF BENEFITS EXISTS ON YOUR CLAIM.

IF YOU HAVE ANY QUESTIONS ABOUT YOUR CLAIM, YOU MAY GET IN TOUCH WITH ANY

SOCIAL SECURITY OFFICE. MOST QUESTIONS CAN BE HANDLED BY TELEPHONE OR MAIL. IF YOU VISIT AN OFFICE, HOWEVER, PLEASE TAKE THIS NOTICE WITH YOU.

ENCLOSURE - SSA 05-10058

IMPORTANT INFORMATION

If You Disagree With This Decision

If you believe that this determination is not correct, you may request that your case be re-examined. If you want this reconsideration, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the determination made on your claim.

Information About Overpayments

If you have been overpaid and you cannot afford to refund the full overpayment at one time get in touch with any social security office to see about repayment by installments.

Any overpayment must be paid back unless both of the following statements are true:

--The overpayment wasn't your fault in any way and you accepted the payment(s) because you thought they were correctly paid, and

--You couldn't meet your necessary living expenses if you had to pay back the overpayment or if it would be unfair for some other reason.

If you believe you were without fault and that you should not have to repay the money, you should call, write, or visit any social security office to discuss the matter. The people there may ask you about your assets, monthly income, and expenses to help decide whether repayment would cause you financial hardship.

If You Again Become Disabled

If your condition again prevents you from doing substantial gainful work before age 65, you should get in touch with any social security office about filing a new application for disability benefits. If you apply promptly and are again found entitled to disability benefits, your benefit payments may start with the first full month in which you were again disabled.

If You Are Now Age 62 Or Over

Retirement benefits are payable at a reduced rate as early as age 62. If you are age 62 or over, you may wish to ask the people in any social security office for more details.

APPENDIX F

Excerpt from Notice of Termination form dated March 4, 1982 and addressed to Lillian Nixor:

In view of your request for reconsideration, all the information about your claim has been carefully evaluated. It has been determined that the previous decision was proper under the law

A period of disability was established for you beginning October 1969. The law provides that an individual's disability period shall end if the person is able to do his or her usual occupation or any other kind of substantial work considering the person's age, education and work experience. The law also provides that an individual will receive benefit payments for the month disability ends and the following two months. The evidence in your case shows that you became able to do substantial gainful work in

February, 1982. Therefore, it has been determined that entitlement to disability benefits ended with the month of April, 1982.

On reconsideration, all the evidence was reviewed, and no condition was disclosed that would prevent you from working.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through any Social Security office. Read the enclosed leaflet for a full explanation of your right to appeal.

/mj
Enclosure:
SSA Pub. No. 70-10282 C98

DISABILITY DETERMINATION RATIONALE

Name of Claimant	SSN
Lillian T. Nixon	419-22-8055

The following medical reports were used in considering your claim: Dr. N. E. Perret's report of September 9, 1981; Whitfield Memorial Hospital's report of June 25, 1981 to September 29, 1981 and report taken by telephone February 22, 1982 with Dr. R. M. Holifield's office.

The evidence shows that you died February 19, 1982. A review of the medical evidence shows that you were disabled due to your peptic ulcer disease up to your date of death. After that time no disability issue exists.

The statement of evidence in the determination of December 2, 1981, except as modified herein, is hereby incorporated by reference, but not the inferences, findings or conclusions thereon.

This decision reopens, revises and reverses the decision of December 2, 1981. The termination of benefits was based on insufficient evidence based on failure to appear for a consultative examination. Her physician stated that she was unable to go to an examination due to weakness. Due to ulcer disease, this condition ultimately resulted in death February 19, 1982. Therefore it would appear that an error was made and disability should have continued until February 19, 1982, the date of death.

Type of Claim
DIB

Disability Examiner DDS	Date
RMB	3/3/82
Review Physician DDS	Date
(Illegible)	(Illegible)